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No. 914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, *Petitioner*

v.

SEMINOLE ROCK AND SAND COMPANY

BRIEF OF RESPONDENT IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI

ROBERT RUARK, Raleigh, North Carolina
BENNETT H. PERRY, Henderson, N. C.
ROBERT H. ANDERSON, Miami, Florida
J. M. HEMPHILL, Chester, S. C.
SAMUEL W. RUARK, Raleigh, N. C.

Attorneys for Respondent, Seminole Rock & Sand Company

COMMERCIAL PRINTING CO., RALEIGH, N. C.

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JURISDICTION

Respondent, of course, concedes the right of this Court in the exercise of its discretion, to take jurisdiction of the cause if good reason has been made to appear, but Respondent asserts that no good reason exists for the issuance of the Writ of Certiorari.

QUESTION PRESENTED

The question presented is whether the ceiling price of Respondent under the statute and regulations was the current price charged by the Respondent for delivery during the month of March, 1942, or was it the highest price at which Respondent made physical delivery under a long-term contract entered into in the fall of 1941 as contended by the Administrator?

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are those set forth in the petition of the Administrator and to which should be added the following:

Amendments to Maximum Price Regulation No. 188, particularly Amendment No. 3 issued December 4, 1942 (O.P.A. Document No. 7928), the pertinent portions of which are as follows:

"(iii) * * *

Provided, however, That

(a) If before April 1, 1942, the seller raised his prices for a commodity to all his classes of purchasers (or to all his classes of purchasers except those to which he was bound to make delivery during March, 1942, under a firm commitment made before the price rise), and

(b) If during March, 1942, he delivered the commodity at the increased price to at least one class of purchasers, then, in order to allow the seller to apply the price rise to any class of purchasers to which no delivery was made during that month after the price rise (except under a firm commitment made before the price rise), the highest price charged during March, 1942, shall be deemed to be:"

Press Release (O.P.A. No. 1223) dated December 5, 1942, for release to Saturday morning papers, December 5, 1942.

The pertinent language of this release is as follows:

"The effect is to allow one, who last March delivered at prices established by a contract signed many months before and who raised his prices generally before April 1, to bring his prices on the expiration of the contract in line with the increased prices he was charging in March. March is the base period under the two regulations."

U. S. C. A. Title 50, App. paragraph 942, (a) and (b) reading as follows:

"Parag. 942. DEFINITIONS
As used in this Act—
(a) The term 'sale' includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms 'sell,' 'selling,' 'seller,' 'buy,' and 'buyer,' shall be construed accordingly.
(b) The term 'price' means the consideration demanded or received in connection with the sale of a commodity."

Amendment No. 38 to General Maximum Price Regulation effective date December 10, 1942, issued December 5, 1942, O.P.A. Document No. 7926 (incorporated by reference into MPR 188). The pertinent provisions are provisions (1) and (2) and they are identical with Amendment No. 3 to Maximum Price Regulation 188, quoted above except that the amendment in the General Maximum Price Regulation incorporates services in addition to commodities as controlled by the Maximum Price Regulation.

General Maximum Price Regulation No. 1499.20, Subdivisions (h) (p) and (r), the pertinent parts of which are as follows:

"(h) 'Offering price' means the price quoted in the seller's price list, or, if he had no such price list, the price which he regularly quoted in any other manner * * *."
(p) 'Sale at wholesale' means a sale by a person who *buys* a commodity and resells it, without substantially changing its form, to any person other than the ultimate consumer * * *."

This change of language to read as above was made to the original regulation by amendment No. 7 of June 19, 1942, the word "buys" formerly read "receives delivery."

"(r) 'Sell' includes sell, supply, dispose, barter, exchange, lease, transfer, and deliver, and contracts and *offers to do* any of the foregoing. The terms 'sale,' 'selling,' 'sold,' 'seller,' 'buy,' 'purchase' and 'purchaser,' shall be construed accordingly."

FACTS

Respondent is a producer of crushed stone, a commodity subject to Maximum Price Regulation No. 188 and the amendments thereto. During the month of October, 1941, or just prior thereto, Respondent entered into a contract with the Seaboard Air Line Railway Company whereby it agreed to furnish the latter, on demand, crushed stone, generally known as ballast because of the purpose for which it was used, at a price of sixty cents (.60) per ton, to be delivered when called for by the purchaser. In the latter part of January, 1942, Respondent verbally made a firm commitment to sell and deliver, on demand, to V. P. Loftis Company crushed stone, substantially the same product, at one dollar and fifty cents ($1.50) per cubic yard. The contract with Loftis was confirmed in writing February 11, 1942 (Exhibit A, R. p. 22). On January 15, 1942, there was an actual physical delivery to Loftis of a portion of the crushed stone Respondent had committed itself to deliver on demand. Respondent proceeded in good faith to crush and stockpile the crushed stone it had contracted to deliver Loftis on demand and as the stone was crushed and stockpiled it was inspected and accepted by a Government inspector, as being the product the Respondent was committed to deliver Loftis. On March 12, 1942 (R. p. 24) Loftis wired Respondent: "Operations on our Stuart contract to continue. Stop. Continue shipments on our order." Before Respondent was able to make further actual delivery Loftis advised Respondent that for reasons beyond Respondent's control, Respondent should not make further shipments until some date subsequent to the month of March, 1942. The buyer found that it would not be able to use any more of the commodity until after March, 1942, and so advised Respondent (Exhibit D, R. p. 24).

Solely by reason of the fact that Respondent had been advised by Loftis not to make further actual shipments during March, 1942, the only actual delivery made during the month of March of the same commodity was to the Seaboard Air

Line Railway Company for the purpose of partial completion of the pre-existing contract entered into in October, 1941.

The courts below found upon substantial evidence that the commodity sold and delivered to the Seaboard Air Line Railway Company was substantially the same as that sold and delivered to V. P. Loftis Company, and likewise found that Loftis and Seaboard Air Line Railway Company were purchasers of the same class.

Under the contract of sale to Loftis there were two classes of stone (Exhibit A, R. p. 22), Class A Stone and Class B Stone, the two classes differing only as to size and having the same market price of one dollar and fifty cents ($1.50) per cubic yard.* The Class B Stone under the Loftis contract was the same commodity sold to the Seaboard Air Line Railway Company and was used interchangeably.

By another contract, between October 8, 1942, and December 15, 1942, Respondent sold and delivered to Seaboard Air Line Railway Company 25,239.25 tons of crushed stone at 85 cents per ton and by another contract commencing on or about December 15, 1942, sold and delivered to the Seaboard Air Line Railway Company 92,316.15 tons of crushed stone at $1.00 per ton. These two last mentioned contracts and deliveries to the Seaboard Air Line Railway Company are the basis of the claim of the Administrator in so far as his action was for treble damages, and likewise on which he sought an injunction.

The District Court dismissed the action on the grounds (1) that whatever cause of action existed to recover a judgment under Section 205(e) of the Act was vested in the purchaser and not in the Administrator, and (2) that $1.50 per ton was the highest price "charged for delivery" of that commodity in March, 1942, thereby becoming the ceiling price on the commodity, and that the price of 60 cents per

* There is no appreciable difference between a cubic yard of crushed stone and a ton of the same material, as stated by the Circuit Court (R. p. 204).

ton for the same commodity delivered to the Seaboard Air Line Railway Company in March, 1942, under a pre-existing contract was not the maximum price at which Respondent could lawfully sell that commodity, as contended by the Administrator.

The Price Administrator appealed. The Circuit Court of Appeals disagreed with the District Court with respect to who had the right to maintain the action, holding that the Administrator and not the buyer had such right, but agreed with the District Court in its holding that $1.50 per ton was Respondent's ceiling price for the commodity involved, as shown by the proper interpretation of the statute and pertinent regulations.

These concurrent findings of the two courts, as this Court has often held, should be accepted as conclusive unless clearly erroneous. *United States v. Commercial Credit Company*, 286 U. S. 63.

ARGUMENT OPPOSING GRANTING OF THE WRIT

I.

The primary reason assigned by the Petitioner for granting Certiorari in this case is his contention that "the decision of the Court below puts in question the correctness of the basis upon which millions of maximum prices have been established." Such a contention is incredible and altogether without support either in the record or by any process of reason. The ruling of the Court of Appeals does not in any wise affect any of the other prices established under the Administrator's regulations. Nor is there any support whatsoever for the Administrator's contention that the interpretation of the Act and Regulations affect adversely the determination of the base period. On the contrary, the Court clearly recognizes the month of March, 1942, as being the base period and that the core of the price regulation is its requirement that each seller charge no more than the price which he charged during the base period of March 1-31, 1942. Because of the evi-

dence showing that during the base period of March, 1942, the current price at which Respondent had not only contracted but also committed and prepared to deliver and had in fact constructively delivered the commodity to a purchaser of the same class, it concluded and held that $1.50 per ton was the highest price "charged for delivery" of that commodity in March, 1942. Nor is there any support in the record for the Administrator's contention that the ceiling price so fixed was a forward looking offer or contract on a basis higher than the current prevailing price of March. On the contrary, it was clearly a firm commitment for delivery in March. Nor can there be any merit in the contention that the construction placed upon the Statute and Regulations by the Court can have the effect of unsettling the prices established by the Administrator's regulation.

It is a matter of common knowledge that manufacturers and producers of commodities continuously deliver all products produced promptly so that the chances are that another factual situation identical with those of the case at bar is most improbable and so altogether remote that there is practically no chance whatsoever of this decision having the slightest effect on any of the ceiling prices heretofore or hereafter established pursuant to the Act and Regulations.

As a matter of fact, the construction of the Statute and Regulation contended for by the Administrator would serve to defeat the Administrator's declared purposes as set out on page 16 of the Petition for the Writ of Certiorari. There the Administrator says "in the first place, in the interest of certainty and the preservation in so far as practicable of current price relationships, the base period of a month was determined to be the maximum which was feasible."

It can be immediately seen that if ceiling prices are to be determined solely upon the basis of actual deliveries made pursuant to contracts entered into in October, 1941, in utter disregard of current prices prevailing during the base period of March, 1942, the result would of necessity be that the

current prices of the base period of March, 1942, would be disregarded and in place thereof the ceiling prices would be fixed on the current price prevailing in the month of October, 1941; and correspondingly, although the Administrator says that a month is the maximum base period, the length of the base period is increased to run from October, 1941, to March, 1942, both inclusive.

The Regulation on its face apparently intended to make prices quoted in March, 1942, for immediate delivery, *i.e.*, in March, 1942, as the ceiling. The Administrator, in drafting the regulations, surely never intended to go back for months to find a price that was made under an old contract which required a delivery in March, 1942. The whole purport of the Regulation is to use current prices in March, 1942.

II.

The second reason assigned by the Petitioner is that the Court gave a construction contrary to the carefully considered, consistent and well-known interpretations of the Regulation. Administrative interpretations are valuable where they have been of long standing, or widely known and unchallenged. Their value depends on the presumption of correctness that flows from the failure of parties affected to question the interpretation over a long period of time. No such rule should be invoked here.

The principle here stated is clearly set out in *Walling v. Swift & Co.*, 131 Fed. (2d) 249 (7th Cir.), the Court said, at page 252:

> "We have given consideration to the fact that this is an administrative interpretation of the Act promulgated by the Department, but we do not think it has determinative influence. It must be remembered that this interpretation of the Department is new and affords the very basis of this controversy, in the making of which the defendant has challenged this ruling at its first opportunity.

> "In our opinion for such a ruling to prove persuasive it should have been settled and acted upon by the Department and acquiesced in by those affected thereby for such time as would lead one to believe that because of the acceptance of this interpretation it had gained some sanction."

See, also, to the same effect: *W. P. Brown & Sons Lumber Company v. L. & N. R. R. Co.*, 299 U. S. 393, 57 Sup. Ct. Rep. 265; *Fort Worth and Denver City Ry. Co. v. Childress Cotton Oil Co.*, 48 Fed. Supp. 937; *Sandford's Estate v. Commissioner of Internal Revenue*, 308 U. S. 39, 60 Sup. Ct. Rep. 51, 60, and *Nagle v. O'Connor*, 88 Fed. (2d) 936, 939.

In addition to these considerations the Administrator in construing his own regulations could have worded it in any way he pleased and he could have made it mean what he now contends it means, provided, of course, it would not conflict with the Act from which his powers were derived.

In that connection sight should not be lost of the definition contained in Section 302 of the Emergency Price Control Act of 1942.

> "(a) The term 'sale' includes sales, dispositions, exchanges, leases and other transfers, and contracts and offers to do any of the foregoing. The terms 'sell,' 'selling,' 'seller,' 'buy' and 'buyer' shall be construed accordingly."

To substantially the same effect is the promulgation of the Administrator, himself, see quotation above from 1499.20-(r).

It will thus be seen that both Congress and the Administrator placed sales and offers for sales on exactly the same basis.

III.

The third purported reason appears on page 19 of the Petition and is without merit. In the first place, it clearly appears from the decision itself (145 F. (2d), 482-5) that

the Circuit Court of Appeals recognized its lack of jurisdiction to consider the validity either of the Act or the Regulation and specifically so stated in the following language:

"The validity of this Regulation is not questioned . . ."

And:

"Moreover, since this Court has no jurisdiction to consider the validity or invalidity of these particular Regulations, we must accept and apply them in a manner consistent with their validity."

The Court did properly interpret the Regulation which it not only had jurisdiction but had the duty to do when the question of its interpretation was presented to it and the power of the Court to interpret the Regulation is not only clearly recognized by the Court but has been insisted upon by the Administrator himself, as will appear from the language of the Court in the case of *Marlene Linens v. Bowles*, 144 Fed. (2d), 874, as follows:

"The primary contention of the complainant is that the interpretation placed upon the Regulation by the Administrator's . . . office was wrong. The Administrator urges that this is the sole issue which Complainant seeks to raise and that in the absence of an attack upon the validity of the Regulation, such a question is not cognizable in this Court (U. S. Emergency Court of Appeals) he (Administrator) suggests that in an appropriate Court the Complainant may obtain a declaratory judgment as to the interpretation and applicability of the Regulation. He (Administrator) also suggests that in an enforcement proceeding against it for an alleged violation of the Regulation, the Complainant may defend on the ground that the Administrator's interpretation is erroneous and that the Regulation is inapplicable to it. We (the Court) agree that if the Complainant merely sought an interpretation of the Regulation, without in any way attacking the validity, it would not be cognizable by this Court."

It thus appears that the Administrator has not only never questioned the right and duty of a District Court or a Court of

Appeals to interpret a Regulation but has insisted that such Courts alone have the right so to do and that the Emergency Court of Appeals is altogether without jurisdiction so to do.

IV.

The fourth reason assigned by the Petitioner for granting a Writ of Certiorari is that the decision below is inconsistent with that of the District Court of the Eastern District of Illinois in *Bowles v. Good Luck Glove Company*, 52 F. Supp. 942. Actually, the Circuit Court of the Seventh Circuit has not finally acted upon the final judgment in the *Good Luck Glove Company* case, as noted by the Administrator's Petition. The action taken by the Circuit Court of Appeals was taken upon an interlocutory appeal from an order which denied an injunction and the merits of the case were not before the Court. The Circuit Court, however, did say that the District Court had filed an opinion with which the Circuit Court was in accord.

Even if that opinion by the Circuit Court of Appeals can be considered as a final adjudication on the merits of the issues involved, it appears, and is hereby demonstrated, that the decision in that case and in the case at bar are really not in conflict, except only to the extent that the final findings of fact as arrived at by the two Courts necessarily differ because of the existence of different states of facts and circumstances surrounding the respective transactions, warranting the application of different sections of the regulations involved.

As a matter of fact, the controlling and vital question in both cases is whether or not an actual delivery made under a pre-existing contract is the sole determinative factor in ascertaining the maximum price. In the *Good Luck Glove Company* case there were certain contracts which antedated the base period of March, 1942, by many months, and during March, 1942, there were deliveries of the commodities only under the pre-existing contracts, but there were absolutely no deliveries of those same commodities under general price in-

creases made and published during the month of March, 1942, until after the month of March, 1942. It was the contention of the Administrator that the ceiling prices for the specific commodities had been fixed by reason of the actual deliveries during March, which were made in partial compliance with the pre-existing contract. The Court held that the prices upon which the company had become committed some months before were not the maximum prices because such prices were not the current prevailing prices during the base period of March, 1942, and it was not the intention of Congress or the Administrator to fix the ceiling as of March at the prices fixed on outstanding contracts antedating March by several months. In the case at bar, it was the contention of the Administrator (just as it was in the *Good Luck Glove Company* case) that the ceiling price of Respondent's commodity had been fixed by reason of the fact that the only actual physical delivery it made was in partial compliance with a pre-existing contract entered into many months prior to the base period of March, 1942. Such a construction of the Statute and Regulations was rejected by the Circuit Court of Appeals for the Fifth Circuit, just as it was by the Seventh Circuit Court of Appeals. It thus conclusively appears that in each and both, the determinative opinion expressed by each of the two Circuit Courts of Appeal was to give to the Statute and Regulations an interpretation whereby the maximum price should be fixed on a basis of the current prices prevailing during the base period of March, 1942, and not on a basis of pre-existing contracts entered into many months before March, 1942.

The error into which the Petitioner falls when he says that the two cases are inconsistent becomes apparent when it thus clearly appears that each and both of the two Circuit Courts of Appeal, having given the same interpretation to the Statute and Regulations in holding that a contract antedating March by many months was not controlling, then proceeded to apply the proper method under the facts of each of the cases in

ascertaining ceiling prices applicable to the commodity in each case. In the *Good Luck Glove Company* case, this ceiling price was arrived at by applying the proper differentials appearing warranted by the peculiar facts of that case. In the case at bar, no differentials being involved, the Court properly applied the rule of the highest prices "charged for delivery" and thus arrived at the ceiling price of $1.50 as found.

The Administrator is most evidently mistaken in contending that the Courts in the case at bar fixed the ceiling price of $1.50 on Respondent's product by virtue of a pre-existing contract with V. P. Loftis Company. As a matter of fact, that was not the method used by the Courts. On the contrary, it is clear that the Courts arrived at the ceiling price of $1.50 not because it was a pre-existing contract but because it was the Respondent's highest current price prevailing during the base period because of the fact that the Respondent had made a firm commitment to deliver at that price during March, had on hand the product for delivery which it had constructively delivered by its having been inspected, passed and actually ordered delivered, when circumstances beyond Respondent's control prevented actual physical delivery during the base period. The only evidence offered as to the highest price charged for delivery during the month of March, 1942, were the facts just outlined.

CONCLUSION

From the foregoing statements it is apparent that none of the reasons advanced by the Administrator has support either in the record or as logical or reasonable deductions therefrom. On the contrary, it conclusively appears that in the final analysis the decision in this case amounts to nothing more than a factual conclusion arrived at in a civil action based upon substantially identical reasonable interpretations of the Act and Regulation involved by two Circuit Courts of Appeal when applied to the particular facts of the case. Being thus nothing more than an adjudication to the effect that the Admin-

istrator is not entitled either to a recovery of damages or to an injunction, this case stands alone as the final determination of an action which in no way affects or interferes with the general declared purposes of the Emergency Price Control Act or its enforcement or the Regulations issued pursuant thereto. We are confident that this Court will not undertake to review findings of fact concurred in by both the District Court and the Circuit Court of Appeals.

It is respectfully submitted that the Petition should be denied.

ROBERT RUARK, Raleigh, North Carolina
BENNETT H. PERRY, Henderson, N. C.
ROBERT H. ANDERSON, Miami, Florida
J. M. HEMPHILL, Chester, S. C.
SAMUEL W. RUARK, Raleigh, N. C.

Attorneys for Respondent, Seminole Rock & Sand Company.